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# THE PRISON LITIGATION REFORM ACT: THE NEW FACE OF COURT STRIPPING\*

*John Boston†*

## INTRODUCTION

One of the pillars of civic pride in the United States is the idea of equal justice under law. In that light, it is interesting to contemplate the Prison Litigation Reform Act ("PLRA"),<sup>1</sup> which is explicitly dedicated to creating unequal justice under law, and does so by establishing a code of special restrictive rules for one unpopular group of litigants. Indeed, in typescript the PLRA comprises twelve rather closely spaced pages dedicated to the purpose of making it more difficult for prisoners to get into court and, once there, harder to get relief on claims concerning the conditions of their confinement.

But for purposes of this discussion, it may be more appropriate to describe the PLRA as representing what may become the new face of court stripping. In the past, debate about court stripping was usually framed in terms of Congress's ability to take away federal court jurisdiction over

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\* ©2001 John Boston. All Rights Reserved. The present text is a revised version of informal remarks given at the Brooklyn Law School Edward V. Sparer Public Interest Law Symposium, "Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction, held on April 5, 2001. I wish to thank David Fathi, Esq., of the National Prison Project of the American Civil Liberties Union, and Doris A. Lewis, Esq., of the Prisoners' Rights Project of the New York City Legal Aid Society, for their valuable comments on this final version.

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<sup>1</sup> Pub. L. No. 104-134, 110 Stat. 1321-66 (1996).

certain kinds of constitutional claims, or certain kinds of remedies for constitutional violations—i.e., to put them out of bounds and off limits.<sup>2</sup>

The PLRA takes what might be described as a more nuanced approach. On the surface, at least, it does not draw lines and erect walls so much as it sets new standards and establishes new procedures. But a study of the statute and its consequences will show that its effects may well be as devastating to the enforcement of constitutional rights as the simple yes/no, on/off restricting-jurisdiction approach that marked prior efforts at court stripping.

Much of the PLRA is not properly described as concerning court stripping, at least in any direct way. It is about litigant stripping. The statute contains a series of measures addressing the potential plaintiff rather than the court, discouraging prisoners from bringing suit or even barring them entirely. For example, the statute requires indigent prisoners, unlike any other indigent federal court civil litigant, to pay the entire filing fee in installments over a period of time, however long it may take.<sup>3</sup> This requirement may not sound particularly consequential until one realizes that prisoners are, as a category, probably the most impoverished people in the United States. A filing fee of \$150 or \$105 represents an enormous commitment of resources for them. Paying off such fees of those amounts over a period of time when they are getting paid pennies an hour, or nothing, for their labor,<sup>4</sup> or are confined in a segregation unit with no opportunity to work, is a daunting proposition.

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<sup>2</sup> See, e.g., Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Dis-favored Rights out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 135 (1981) (citing measures then pending to eliminate federal court authority to rule on state abortion laws or the induction or registration of women for military service).

<sup>3</sup> 28 U.S.C. § 1915 (a)-(b) (2001).

<sup>4</sup> See, e.g., *Tourscher v. McCullough*, 184 F.3d 236, 239 (3d Cir. 1999) (noting prisoners' monthly pay of about \$15); *Jennings v. Lombardi*, 70 F.3d 994, 995 (8th Cir. 1995) (noting lack of pay for prisoners' work in Arkansas); *Wendt v. Lynaugh*, 841 F.2d 619, 620 (5th Cir. 1988) (noting lack of pay for most prisoners' work in Texas); *Gaston v. Coughlin*, 102 F. Supp. 2d 81, 83 (N.D.N.Y. 2001) (noting daily pay of \$1.55 for prisoner working in food service).

Second, the PLRA establishes, uniquely for prisoners challenging prison conditions, a categorical requirement of exhaustion of administrative remedies.<sup>5</sup> In the abstract, such a requirement may not seem objectionable. However, applied to the mostly uneducated, unsophisticated, and legally uncounselled population of the prisons, the requirement invites technical mistakes resulting in inadvertent non-compliance with the exhaustion requirement, and barring litigants from court because of their ignorance and uncounselled procedural errors.<sup>6</sup> It also subjects prisoners' right to sue over unconstitutional conduct to the considerable power of prison staff to retaliate against and intimidate prisoners and to manipulate the operation of grievance systems.<sup>7</sup>

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<sup>5</sup> "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

<sup>6</sup> For example, it is not obvious that a prisoner who seeks only damages for a completed act such as a physical assault must exhaust administrative grievance procedures that do not provide damages, but the Supreme Court so held in *Booth v. Churner*, 532 U.S. 731 (2001). One wonders how many prisoners will manage to learn that rule in the very short time periods allowed by some prison systems for filing grievances. See, e.g., Rhode Island Dep't of Corrections, Policy No. 13.10 DOC (May 20, 1996), at 3 (allowing three days); Metro Dade (Florida) Dep't of Corrections and Rehabilitation, D.S.O.P. No. 15-001 (January 9, 1995) at 2, 4-5 (allowing three working days to file, forty-eight hours to appeal). Prisoners' claims have also been held barred for non-exhaustion for their failure to appreciate fine distinctions that many lawyers would miss. See, e.g., *Giano v. Goord*, 9 F. Supp. 2d 235, 239 (W.D.N.Y. 1998), *aff'd in part, vacated in part on other grounds*, 250 F.3d 146 (2d Cir. 2001) (holding that prisoner who had appealed a disciplinary conviction he alleged was filed in retaliation for protected conduct, based on false misbehavior reports and evidence and a mishandled urine sample, had not exhausted administrative remedies because he had not also filed separate grievances about the retaliation, the mishandling of his urine sample, and the false misbehavior reports and evidence); *Hattie v. Hallock*, 8 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (holding that in order to challenge a prison rule, the prisoner must not only appeal from the disciplinary conviction for breaking it, but must also separately grieve the validity of the rule), *judgment amended*, 16 F. Supp. 2d 834 (N.D. Ohio 1998).

<sup>7</sup> One of the dirty secrets of American corrections is the persistence of covert threats and retaliation against prisoners who complain about their treatment, including those who use the grievance systems that the PLRA has now made mandatory. Despite the enormous difficulty of proving this kind of claim, there is a steady stream of court and jury findings documenting such actions. See, e.g., *Walker v. Bain*, 257 F.3d 660, 663 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in

The PLRA restricts, in prisoner cases, the statutory attorneys' fees that are available to all other successful civil rights litigants,<sup>8</sup> making it more difficult for prisoners to obtain the assistance of counsel in civil cases, and thereby devastating their ability to get relief even if they manage to get into court.

Finally,<sup>9</sup> and most offensive in principle, the so-called three strikes provision bars prisoners from using the *in forma pauperis* provisions if they have previously had three or more complaints or appeals dismissed as frivolous, malicious, or failing to state a claim.<sup>10</sup> This PLRA provision allows an exception for persons in "imminent danger of serious physical injury," but not for persons who seek redress for past serious

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isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances); *Hunter v. Heath*, 95 F. Supp. 2d 1140 (D. Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F. Supp. 2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), *on reconsideration*, 102 F. Supp. 2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F. Supp. 2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

<sup>8</sup> 42 U.S.C. § 1997e(d); compare 42 U.S.C. § 1988, the fee statute applicable to non-prisoner litigants.

<sup>9</sup> "Finally" is rhetorical, since this discussion does not exhaust the strictures of the PLRA. The statute also contains provisions restricting the use of special masters in prison cases, 18 U.S.C. § 3626(f); expanding the scope of *sua sponte* dismissal of prisoner cases (as well as non-prisoner *in forma pauperis* cases) from those that are frivolous or malicious to include those that merely fail to state a claim, 28 U.S.C. § 1997e(c)(1), 28 U.S.C. § 1915(e)(2) and requiring the early screening of prisoner cases to that end, 28 U.S.C. § 1915A; excusing defendants from filing answers in prisoner cases until ordered to do so by courts, 42 U.S.C. § 1997e(g); encouraging hearings by telecommunications and at prisons, 42 U.S.C. § 1997e(f); and permitting courts to deprive adult federal prisoners of time off for good behavior if the court finds that a claim was filed maliciously or for harassment, or the claimant testified falsely or otherwise presented false evidence or information, 28 U.S.C. § 1932 (2001); requiring prisoners' damage awards to be paid directly to satisfy their restitution orders, Pub. L. No. 104-134, Title I, § 101(a)[Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76 *renumbered* Title I Pub. L. No. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327 (not codified; appears after 18 U.S.C.A. § 3626); and requiring notification of crime victims of such damage awards. Pub. L. No. 104-134, Title I, § 101(a)[Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76; *renumbered* Title I Pub. L. No. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327 (not codified; appears after 18 U.S.C.A. § 3626).

<sup>10</sup> 28 U.S.C. § 1915(g).

injury, or persons in imminent danger of loss of other important constitutional rights. Thus, these prisoners must ante up \$105 or \$150 up front or they are simply out of court. There is no time limit on this disqualification,<sup>11</sup> which has been applied retroactively to count "strikes" from before the PLRA's enactment.<sup>12</sup> This provision is more than a nuisance or even a hardship. It is an absolute barrier to a litigant who does not have the money for filing fees—and many do not. This class of absolutely indigent prisoners is composed disproportionately of the most oppressed people in the prison system, those held in administrative and disciplinary segregation units, frequently the locus of the worst abuses and harshest conditions in the prison system.<sup>13</sup> These prisoners are generally barred from prison jobs and have no means of earning money. Under the PLRA, their indigency will bar many of them from any ability to seek judicial redress.<sup>14</sup>

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<sup>11</sup> See, e.g., *Evans v. McQueen*, No. 97-6471, 1997 U.S. App. LEXIS 26886 (4th Cir. Sept. 29, 1997) (barring prisoner from proceeding IFP based on "strikes" from 1981-84).

<sup>12</sup> See, e.g., *Welch v. Galie*, 207 F.3d 130 (2d Cir. 2000).

<sup>13</sup> See, e.g., *Blissett v. Coughlin*, 66 F.3d 531 (2d Cir. 1995) (affirming damage award for confinement in feces-smeared strip cell in mental observation unit); *Sheppard v. Phoenix*, 1998 WL 397846, at \*8 (S.D.N.Y. July 15, 1998) (noting settlement of suit in which defendants conceded constitutional violation with respect to unnecessary and excessive force in Rikers Island segregation unit); *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (finding a pattern of excessive force, denial of adequate medical care, and other Eighth Amendment violations in Pelican Bay segregation unit).

<sup>14</sup> To date, all the federal appeals courts that have considered the question have upheld the constitutionality of the three strikes provision. See *Medberry v. Butler*, 185 F.3d 1189, 1192-93 (11th Cir. 1999); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *White v. State of Colorado*, 157 F.3d 1226, 1233-34 (10th Cir. 1998); *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *Rivera v. Allin*, 144 F.3d 719, 723-29 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821 (5th Cir. 1997). But see *Lewis v. Sullivan*, 135 F. Supp. 2d 954, 959-69 (W.D. Wis. 2001) (applying strict scrutiny, holding provision unconstitutional as a violation of right of court access and of equal protection as applied to constitutional claims), *rev'd*, 2002 WL 126607 (7th Cir. Feb. 1, 2002); *Ayers v. Norris*, 43 F. Supp. 2d 1039, 1050-51 (E.D. Ark. 1999) (applying similar rationale), *overruled by* *Higgins v. Carpenter*, 258 F.3d 797, 801 (8th Cir. 2001).

I believe the three strikes provision is unconstitutional for reasons not yet passed on by any court. Litigation is protected by the Petition Clause of the First Amendment, which is governed by the same strict standards as other expressive activity. *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985). Since litigation takes place in court and not in prison, prisoners' litigation is governed by "free world" First Amendment standards and not the diluted standards applicable when considerations of prison administration are at stake. Compare *Thornburgh v. Abbott*, 490 U.S. 401, 403 (1989). Sanctions for litigation are subject to a narrow tailoring principle which

In addition to these litigant-stripping provisions, other significant provisions of the PLRA do operate more directly as court-stripping provisions. The most notable of these are the provision barring actions for mental or emotional injury to prisoners in the absence of physical injury<sup>15</sup> and the series of provisions restricting prospective relief in prison conditions litigation.<sup>16</sup> The remainder of this Essay will discuss some of the interpretive problems, separation of powers issues, and practical obstacles to the vindication of constitutional rights that these provisions raise.

## I. THE BAN ON ACTIONS FOR MENTAL OR EMOTIONAL INJURY WITHOUT PHYSICAL INJURY

The PLRA's mental or emotional injury provision may well present the highest concentration of poor drafting in the smallest number of words in the entire United States Code. It provides in its entirety: "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility for mental or emotional injury suffered while in custody without a prior showing of physical injury"<sup>17</sup> It is unclear from the phrase "a prior showing of physical injury" what "prior" refers to. Since the statute regulates

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*inter alia* limits their application to conscious abuse of the judicial system. See *Profl Real Estate Inv., Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993) (holding litigation may be suppressed under antitrust statutes only when it is objectively baseless *and* for a forbidden anticompetitive purpose); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (applying same principle under National Labor Relations Act). The three strikes provision is therefore unconstitutional insofar as it sanctions prisoners for complaints that do not state a claim or are legally frivolous, rather than limiting its scope to those that are malicious or otherwise intentionally abusive. It is also unconstitutional insofar as it applies a three-strikes rule to all litigants rather than individually assessing their conduct and insofar as the prohibition on use of *in forma pauperis* procedures is unrestricted in time.

Interestingly, Congress has taken the "three strikes" notion a step further in a little-known provision of the Civil Asset Forfeiture Reform Act of 2000 which precludes prisoners who have had three dismissals as frivolous or malicious from contesting a civil forfeiture or appealing in a forfeiture case *at all*—not just via the *in forma pauperis* statutes—absent "extraordinary and exceptional circumstances." 18 U.S.C. § 983(h)(3). To date this statute does not appear to have attracted the attention of any federal court.

<sup>15</sup> 42 U.S.C. § 1997e(e).

<sup>16</sup> 18 U.S.C. § 3626(a-g).

<sup>17</sup> 42 U.S.C. § 1997e(e).

bringing civil actions, the only grammatically sensible interpretation of "prior" is that the showing of injury must occur before the action is filed, a construction which conjures up visions of hopeful litigants, with their crutches and bandages and wheelchairs and eye patches, queued outside the clerk's office waiting to display their stigmata so they can file their cases. Obviously that is not what Congress had in mind, especially in a statute addressing litigants who are behind bars. Since no rational construction of Congress's intent is apparent, the courts have mostly just pretended that "prior" is not there, because there is nothing they can do with it, and have inquired instead whether the plaintiff has sufficiently pleaded or has submitted admissible evidence of injury<sup>18</sup>

On its face, the statute would appear to give prison officials carte blanche to impose all the mental and emotional injury they want on prisoners as long as they do not leave any marks. The courts have partly turned back from that abyss, holding that the statute does not preclude injunctive litigation, only damage claims.

The courts have arrived at this conclusion through somewhat facile means. One appeals court observed, plausibly enough, that the statutory use of the past tense "suffered" suggests that the provision does not apply to claims addressed to the threat of prospective injury. However, it continued: "But more critical is the fact that suits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself."<sup>19</sup> It is not apparent why a suit intended to *avoid* a

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<sup>18</sup> See, e.g., *Liner v. Goord*, 196 F.3d 132, 135-36 (2d Cir. 1999) (holding that alleged physically intrusive strip searches, characterized as sexual assaults, met the physical injury requirement at the pleading stage); *Sarro v. Essex County Corr. Facility*, 84 F. Supp. 2d 175, 177 (D. Mass. 2000) (noting plaintiff's failure to allege in his complaint or subsequently any physical injury resulting from restricted ventilation); *Luong v. Hatt*, 979 F. Supp. 481, 485-86 (N.D. Tex. 1997) (holding that evidence of abrasions, contusions, cuts, scratches, and bruises did not meet the physical injury threshold).

<sup>19</sup> *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998); accord, *Harris v. Garner*, 190 F.3d 1279, 1288 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) ("The underlying claim of an Eighth Amendment violation, however, is distinct from this claim for resulting emotional damages"; holding that claims for declaratory and injunctive relief survive); *Perkins v. Kansas Dep't of Corr.*, 165 F.3d



mentally injurious constitutional violation is not a "civil action for mental or emotional injury" to the same extent as is a suit to redress such a violation after the fact.

The source of judicial discomfort with this provision is stated most explicitly in the leading case of *Zehner v. Trigg*,<sup>20</sup> which held that only the availability and enforceability of injunctive relief saved the statute's constitutionality.<sup>21</sup> The *Zehner* reasoning is, relatively speaking, encouraging, because one widely held traditional view of court stripping was that to forbid *all* federal court remedies for a constitutional violation would not by itself be unconstitutional.<sup>22</sup> Nowadays, prisoner advocates take their victories where they find them, even if they do not have any effect on the outcome of a particular case. But this may yet prove a weak reed; we do not know whether the courts will stick to it when they are presented, as surely they will be, with a statute that removes the injunctive powers of the courts in some category of Bill of Rights challenges.

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803, 808 (10th Cir. 1999); *Zehner v. Trigg*, 133 F.3d 459, 461-63 (7th Cir. 1997); *Amaker v. Goord*, 1999 WL 511990 at \*5 (S.D.N.Y., Jul 20, 1999) (citing *Perkins*, 165 F.3d at 807-08; *Davis*, 158 F.3d at 1346).

<sup>20</sup> 133 F.3d 459 (7th Cir. 1997).

<sup>21</sup> The Court of Appeals stated:

The district court notes near the conclusion of its discussion on the issue of Congress' power that "[t]here is a point beyond which Congress may not restrict the availability of judicial remedies for the violations of constitutional rights without in essence taking away the rights themselves." 952 F Supp. at 1331. Because other remedies, such as "injunctive relief backed up with meaningful sanctions for contempt," exist even when damages are not available, "[t]hat point has not been reached by enactment of § 1997e(e) as applied here." *Id.* As a legal conclusion, this point is unassailable. Because these remedies remain, Congress' decision to restrict the availability of damages is constitutional as applied in this case.

*Id.*

Other appellate courts have followed *Zehner's* reasoning without being so explicit about the unconstitutionality of a prohibition on injunctive relief. See *Harris v. Garner*, 190 F.3d 1279, 1288-89 (11th Cir. 1999), *reinstated in pertinent part*, 216 F.3d 970, 972, 985 (11th Cir. 2000) (en banc); *Davis v. District of Columbia*, 158 F.3d 1342, 1347 (D.C. Cir. 1998).

<sup>22</sup> "Congress seems to have plenary power to limit federal jurisdiction when the consequence is merely to force proceedings to be brought, if at all, in a state court." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363-64 (1953), *reprinted in* PAUL M. BATOR ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 393 (3d ed. 1988).

The next question presented by § 1997e(e) is one of definition: what *is* mental or emotional injury? Many highly intelligent people have spent years thinking about the mind/body problem. The drafters of the PLRA do not appear to have been among them. The statutory language leaves enormous latitude for interpretation, and there is no clarifying gloss in its legislative history.<sup>23</sup> The result has been a wide range of judicial responses.

At one end of the range are statements like the one from a New York District Court: "The term 'mental or emotional injury' has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts."<sup>24</sup> Other courts have arrived at similar results from the opposite direction, asserting, for example, that "[a] prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."<sup>25</sup> At the other extreme are cases exemplified by *Allah v. Al-Hafeez*,<sup>26</sup> in which the prisoner complained that prison policies prevented him from attending services of his religion, and the court, in the

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<sup>23</sup> In general, the legislative history of the PLRA is remarkably thin with respect to the purpose and operation of many of its provisions, including this one. The only substantial legislative report addresses an earlier version of the bill which did not include that provision. See H.R. REP. NO. 104-21, at 24-28 (1995). The conference report merely reports the language of the provision without explanation. See H.R. REP. NO. 104-378, at 65-77 (1995). The floor debate consisted mainly of rhetorical assertions about "liberal federal judges who micromanage State and local prison systems," 141 CONG. REC. S14413, S14414 (daily ed., Sept. 27, 1995), the need for criminals to do "hard time," *id.* at S14419, and prisoners' "churning out lawsuits with no regard to this cost or their legal merit." *Id.* at S14419. There were also many anecdotes about supposed frivolous prisoner lawsuits over melted ice cream, 141 CONG. REC. S14611, S14629, the wrong brand of sneakers, 141 CONG. REC. S14413, S14418, etc. The only reference to a case of mental or emotional injury without physical injury is to a California prisoner who "claimed that he suffered mental anguish worrying that tear gas would be used if he refused to exit his cell." 141 CONG. REC. S14611, S14628. It is unaccompanied by any discussion of the application of the statutory language, and other references to the mental/emotional injury provision are similarly devoid of interpretive guidance. See 141 CONG. REC. S7523, S7525; 141 CONG. REC. S14413, S14414, S14417.

<sup>24</sup> *Amaker v. Haponik*, 1999 WL 76798, at \*7 (S.D.N.Y. Feb. 17, 1999) (declining to dismiss First Amendment claim of interference with legal mail); *accord*, *Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) ("The domain of the statute is limited to suits in which mental or emotional injury is claimed.").

<sup>25</sup> *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999).

<sup>26</sup> 226 F.3d 247 (3d Cir. 2000).

course of holding that he could not pursue a compensatory damage claim, simply assumed that the injury for which he sought compensation must be a mental or emotional one.<sup>27</sup>

Is not being able to go to church a mental or emotional injury? On its face, it is a concrete deprivation that occurs in the real world and not in someone's head, and characterizing it as a mental or emotional injury seems to miss the point.

Another example is arrest without probable cause, resulting in days or more in a police precinct or jail waiting for bail to be posted or the charges dismissed. Is the injury mental or emotional? One would think not; it is more accurately characterized as a deprivation of liberty, the loss both of the general freedom of choice enjoyed by free persons and of the specific choices, opportunities, and associations that a particular wrongly arrested person is prevented from engaging in. One would hope that such a fundamental deprivation would not be dismissed as merely mental or emotional.<sup>28</sup>

The same reasoning would seem to apply to a prisoner who is thrown in the hole (or "special housing," "intensive management," or another of corrections' countless euphemisms). That is, he is removed from ordinary confinement, in which prisoners spend their sleeping hours and some of their waking hours locked in their cells, but are able to leave their cells during the day to work at jobs or attend prison programs, to go to a congregate recreation yard or gym, a library, or a day room with a television. Instead, he is placed into a regime of twenty three-hour cell confinement, deprived of most of the limited personal property allowed prisoners, deprived of almost all the standard activities and privileges of prison life, usually subject to strict limits on communications both with outsiders and with other prisoners, and generally condemned to idleness and monotony.<sup>29</sup> Is this physical

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<sup>27</sup> *Id.* at 250 ("Allah seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.").

<sup>28</sup> So far it has not been so dismissed. The only case on point known to me holds, albeit conclusorily, that a claim of arrest without probable cause is not one for mental or emotional injury. *Friedland v. Fauver*, 6 F. Supp. 2d 292, 310 (D.N.J. 1998).

<sup>29</sup> See *Colon v. Howard*, 215 F.3d 227, 230-32 (2d Cir. 2000) (describing "normal" conditions in disciplinary Special Housing Unit); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 625-26 (S.D.N.Y. 1998) (describing harsher SHU conditions at SHU-only

removal from ordinary prison life to a much more restricted and often explicitly punitive setting only a mental or emotional injury? Some of the limited case law to date suggests that it may be.<sup>30</sup> Moreover, that view has been applied to cases alleging segregated confinement under conditions so squalid as arguably to violate the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>31</sup>

In my view, such decisions are in error. The "minimal civilized measure of life's necessities" guaranteed by the Eighth Amendment means more than freedom from physical, mental, or emotional injury.<sup>32</sup> Dismissing claims of grossly oppressive conditions as involving "merely" mental or emotional injury appears inconsistent with Eighth Amendment doctrine as set forth by the Supreme Court, under which it is the objective seriousness of the conditions, and not a prisoner's perceptions or reactions to them, that determines their lawfulness.<sup>33</sup> Describing a claim alleging conditions that are *objectively* intolerable as an "action for mental or emotional injury" seems

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facility).

<sup>30</sup> See *Higgs v. Carver*, 2000 WL 1902190, at \*9 (S.D. Ind. Dec. 15, 2000); *Taormina v. Phillips*, 2000 WL 1923511, at \*2 (E.D. Mich. Nov. 30, 2000).

<sup>31</sup> *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (barring compensatory damage claims for placement in filthy cells where plaintiff was exposed to the deranged behavior of psychiatric patients).

This view is not unanimous. In *Waters v. Andrews*, 2000 WL 1611126 (W.D.N.Y. Oct. 16, 2000), the plaintiff alleged that after she requested mental health care, she was placed in a filthy punishment cell, kept in a soiled and bloody paper gown, denied a shower and other personal hygiene measures, and exposed to the view of male correctional staff and construction workers. The court held *inter alia* that her Fourth and Eighth Amendment claims were not subject to § 1997e(e) because mental or emotional distress is not a necessary element of either claim. *Id.* at \*4.

<sup>32</sup> Cf. *Austin v. Hopper*, 15 F. Supp. 2d 1210, 1258 (M.D. Ala. 1998) (holding that deprivation of "basic human necessities" of toilet facilities "plainly violates the Eighth Amendment," as does failure to permit prisoners who have soiled themselves to clean their bodies; PLRA not discussed).

<sup>33</sup> *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); see *Helling v. McKinney*, 509 U.S. 25, 35-37 (1993) (instructing as to objective assessment of environmental tobacco smoke exposure). To establish that prison conditions constitute cruel and unusual punishment in violation of the Eighth Amendment, prisoners must show both a subjective component and an objective component. The former turns on the state of mind of the responsible officials, which in most cases must amount to deliberate indifference or knowing disregard of prisoners' rights. See *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994). The latter requires a showing of conditions amounting to "unquestioned and serious deprivations of basic human needs" or of the "minimal civilized measure of life's necessities." See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

to miss the mark considerably, even if such injury (not surprisingly) results from those conditions. Of course, subjection of prisoners to such conditions is likely to result in mental or emotional injury,<sup>34</sup> but that fact does not make the resulting lawsuit an action "for" mental or emotional injury. It is an action "for" the redress of objectively unconstitutional prison conditions,<sup>35</sup> and mental or emotional injury is at most an additional element of damages to be considered if a violation of the Constitution is found.

What is striking and disappointing about the case law under § 1997e(e) is not only the courts' failure to adopt this suggested approach, but also their widespread failure even to ask the right question about the nature of constitutional protections and the interests that they serve.<sup>36</sup> The Bill of Rights, the fundamental charter of American liberty, protects more than just freedom from physical, mental, or emotional injury and to characterize its violation solely in those terms trivializes it. A construction of § 1997e(e) that respects the scope of our liberty requires that courts define these protections in a way that acknowledges that there is more to

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<sup>34</sup> For example, one court has observed that it is both obvious and supported by "plenty of medical and psychological literature" that prolonged isolated confinement inflicts "substantial psychological damage." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313, 1316 (7th Cir. 1988), (citing Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983)); accord, *Baraldini v. Meese*, 691 F. Supp. 432, 446-47 (D.D.C. 1988), *rev'd on other grounds*, 884 F.2d 615 (D.C. Cir. 1989); cf. *In re Medley*, 134 U.S. 160, 168 (1890) (stating, of the Nineteenth Century use of solitary confinement: "A considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.").

<sup>35</sup> See, e.g., *Ustrak v. Fairman*, 781 F.2d 573, 578 (7th Cir. 1986) (holding that "[t]he loss of amenities within prison is a recoverable item of damages," provable by testimony concerning differences in physical conditions, daily routine, etc., the court does not mention mental or emotional injury as part of the analysis).

<sup>36</sup> There are a few honorable exceptions in a small body of case law that limits the application of § 1997e(e) to cases in which mental or emotional injury is central to or an element of the claim, not a potential element of damages. See *Shaheed-Muhammad v. Dipaolo*, 138 F. Supp. 2d 99, 107 (D. Mass. 2001) ("Where the harm that is constitutionally actionable is physical or emotional injury occasioned by a violation of rights, § 1997e(e) applies. In contrast, where the harm that is constitutionally actionable is the violation of intangible rights—regardless of actual physical or emotional injury—§ 1997e(e) does not govern."); *Waters v. Andrews*, 2000 WL 1611126 (W.D.N.Y. Oct. 16, 2000).

constitutionally protected interests such as freedom of speech and the free exercise of religion than protection from psychological injury

The third large question raised by § 1997e(e) is what is an “*action* for mental or emotional injury”? Generally, an “*action*” is a lawsuit, and the plain meaning of the statute is that if an action is determined to be one “*for* mental or emotional injury,” that action is barred from federal court absent some physical injury

Applying that language literally leads to problems under the liberal joinder rules of the federal courts, which permit the amalgamation into a single suit of “as many claims, legal, equitable, or maritime, as the party has against an opposing party”<sup>37</sup> A reading of the statute that requires dismissal of an entire multi-claim suit simply because of the presence of any claim for mental or emotional injury without physical injury “would be not only gratuitous, but also contrary to the fundamental procedural norm that when a complaint has both good and bad claims only the bad claims are dismissed; the complaint as a whole is not.”<sup>38</sup> However, the courts have gone much further than this: they have disassembled “*actions*” not just into claims, but into elements of relief. For example, the decision discussed above that held the deprivation of churchgoing to be a mental or emotional injury did not dismiss the plaintiff’s entire case; rather, it held that the claim for compensatory damages was barred but that the claims for nominal and punitive damages could go forward.<sup>39</sup> In effect, this court and those ruling similarly have rewritten a statute that bars the filing of a certain kind of civil action so that it bars the award of certain kinds of damages instead. In doing so they have sidestepped the difficult task of making sense out of the statutory term “*action for* mental or emotional injury”<sup>40</sup>

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<sup>37</sup> FED. R. CIV. P. 18(a).

<sup>38</sup> Robinson v. Page, 170 F.3d 747, 748-49 (7th Cir. 1999).

<sup>39</sup> Allah, 226 F.3d at 251. Other courts have made similar distinctions. See, e.g., Wagnon v. Gatson, 2001 WL 709276, at \*5 (S.D.N.Y. June 25, 2001); Waters v. Andrews, 2000 WL 1611126, at \*7, \*9 (alternate holding); Marrie v. Nickels, 70 F. Supp. 2d 1252, 1264 (D. Kan. 1999); Mason v. Schriro, 45 F. Supp. 2d 709, 720-21 (W.D. Mo. 1999).

<sup>40</sup> As noted *supra* at note 36, a few cases limit the scope of § 1997e(e) to cases in which mental or emotional injury is central to or an element of the claim, not a

The application of § 1997e(e) is far from settled. However, as the case law is presently developing, it appears the statute at best has dealt a severe blow to prisoners' ability to enforce fundamental constitutional rights. The preservation of injunctive relief by *Zehner* and its progeny, while valuable, does not affect the vast bulk of prisoner litigation, which consists of damage claims.<sup>41</sup> The reason for this preponderance is that much of the unconstitutional conduct by staff to be found in prisons and jails is not a matter of regulations or acknowledged policies. Rather, it consists of arbitrary and/or retaliatory actions, often contrary to official policy, directed toward particular prisoners who are deemed troublesome, in many cases because of behavior that is at least arguably protected by the Constitution.<sup>42</sup> Such behavior is rarely amenable to injunctive relief, and even in instances where an informal custom or policy could in theory be shown,<sup>43</sup> prisoners proceeding pro se—as do the vast majority of prisoner litigants in federal court<sup>44</sup>—are rarely capable of pleading and proving a case of such complexity. Similarly, holdings that prisoners may still seek nominal and punitive damages for abusive treatment and oppressive conditions<sup>45</sup> do not compensate for the prohibition on compensatory damages. There is a high

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potential element of damages. This approach is in fact more consistent with the statutory language barring "*action[s]* brought for mental or emotional injury" (emphasis added) than is the construction that disassembles the "action" and eliminates selected elements of damages.

<sup>41</sup> This statement is based on my reading of decisions and correspondence with prisoners concerning litigation they have filed or intend to file, and it reflects my observation that many of the injunctive claims included by prisoners in those suits are not viable, either because the challenged conduct is not amenable to injunctive relief (e.g., an assault by staff, with no evidence that the same prisoner is likely to be assaulted again) or because the prisoner has been transferred to another institution, thereby mooting the claim.

<sup>42</sup> See, e.g., *McClary v. Coughlin*, 87 F. Supp. 2d 205 (W.D.N.Y. 2000), *aff'd*, 237 F.3d 185 (2d Cir. 2001) (upholding damage award to prisoner convicted of notorious police murder who had been kept in administrative segregation through sham reviews); see also *supra* note 7.

<sup>43</sup> See, e.g., *Daskalea v. District of Columbia*, 227 F.3d 433, 441-42 (D.C. Cir. 2000) (affirming verdict of municipal deliberate indifference to routine practice of sexual harassment of women prisoners).

<sup>44</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation*, at tbl. 6 (Dec. 1994), <http://www.ojp.usdoj.gov/bjs/pub/ascii/ccopaj.txt> (last visited Feb. 8, 2002) (reporting that 96% of prisoner civil rights suits proceed pro se).

<sup>45</sup> See *supra* note 39.

threshold for the award of punitive damages, they are discretionary even if that standard is met,<sup>46</sup> and the reduced prospect of damages is a significant new impediment to prisoners' already difficult task of obtaining counsel for meritorious litigation.<sup>47</sup>

## II. LIMITS ON PROSPECTIVE RELIEF

The PLRA's provisions concerning prospective relief<sup>48</sup> are among the most litigated portions of the statute. Unlike the laconic mental/emotional injury provision, the prospective relief sections are long and explicit and their consequences are multifarious.

First, the statute sets a standard for the grant of prospective relief in prison cases.<sup>49</sup> Relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" and the court must find that it

is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.<sup>50</sup>

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<sup>46</sup> *Smith v. Wade*, 461 U.S. 30, 52 (1983); *see, e.g., Green v. Johnson*, 977 F.2d 1383, 1389 (10th Cir. 1992) (affirming denial of punitive damages where plaintiff's misconduct provoked prison staff's abusive treatment); *Castle v. Clymer*, 15 F. Supp. 2d 640, 668-69 (E.D. Pa. 1998) (denying punitive damages to prisoner notwithstanding finding of retaliation for First Amendment-protected activity).

<sup>47</sup> While 42 U.S.C. § 1988 provides generally that prevailing parties in civil rights litigation may recover attorneys' fees that are "reasonable in relation to the success achieved," *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983), the PLRA limits fee recovery in prisoners' cases to 150% of the judgment, up to 25% of which must be paid from the prisoner's recovery. 42 U.S.C. § 1997e(d)(2). Thus, an attorney representing a prisoner who recovers nominal damages of \$1.00 (a not uncommon occurrence in prisoners' cases enforcing First Amendment and other intangible rights) and no punitive damages will be entitled to a fee of \$1.50. *See Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000).

<sup>48</sup> 18 U.S.C. § 3626.

<sup>49</sup> The statute defines prospective relief as "all relief other than compensatory monetary damages." 18 U.S.C. § 3626(g)(7). Read literally, that definition would include nominal and punitive damages. The courts have not suggested that the statute be read that literally.

<sup>50</sup> 18 U.S.C. § 3626(a)(1)(A).



In addition, the court must refrain from ordering local or state officials to exceed their authority or to violate local or state law unless it is necessary to remedy a violation of federal law<sup>51</sup>

This part of the prospective relief provisions carries a certain rhetorical force but does not significantly change the law<sup>52</sup> Courts of equity have always been expected to exercise their powers with restraint and with concern for the external effects that their actions may have.<sup>53</sup> However, one aspect of this codification of equitable practice marks a drastic departure from prior practice. The PLRA restricts the circumstances under which courts may "grant or approve" prospective relief<sup>54</sup>—i.e., its restrictions apply not only where the case is tried and a federal law violation is found, but also in cases where the parties decide to settle. This point is repeated in a separate section of the statute, which states explicitly that consent judgments can be entered only upon compliance with the requirements of 18 U.S.C. § 3626(a).<sup>55</sup> Parties may avoid that stricture only by entering into "private settlement agreements" which are enforceable only in state court.<sup>56</sup> In

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<sup>51</sup> 18 U.S.C. § 3626(a)(1)(B).

<sup>52</sup> The federal courts have acknowledged that the PLRA standard is generally consistent with pre-existing law. See *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000); *Smith v. Arkansas Dep't of Corr.*, 103 F.3d 637, 647 (8th Cir. 1996) (holding PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction"); *Williams v. Edwards*, 87 F.3d 126, 133 n.21 (5th Cir. 1996); see also *Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986) (applying similar standard pre-PLRA). Public safety and criminal justice system concerns have been given great weight in injunctive prison litigation. See, e.g., *Duran v. Elrod*, 760 F.2d 756, 760-61 (7th Cir. 1985) (enforcing jail crowding order). Federal courts have required compelling justification to grant injunctions overriding state and local law. See *LaShawn A. by Moore v. Barry*, 144 F.3d 847, 853 (D.C. Cir. 1998) (stating, in a non-PLRA case: "Disregarding local law is a grave step and should not be taken unless absolutely necessary."); *Stone v. City and County of San Francisco*, 968 F.2d 850, 861-65 (9th Cir. 1992) (discussing extent of federal courts' authority to override state and local law).

<sup>53</sup> See *NLRB v. P\*I\*E Nationwide, Inc.*, 894 F.2d 887, 893 (7th Cir. 1990) ("The issuance of an injunction is the exercise of an equitable power, and is subject to the equitable constraints that have evolved over centuries in recognition of the heavy costs that injunctions can impose (including costs to innocent third parties) and the potential severities of contempt."). Cf. *Younger v. Harris*, 401 U.S. 37, 43 (1971) (citing historic "fundamental purpose of restraining equity jurisdiction within narrow limits" as well as additional federalism concerns raised by intervention into state functions).

<sup>54</sup> 18 U.S.C. § 3626(a)(1)(A) (emphasis added).

<sup>55</sup> *Id.* § 3626(c)(1).

<sup>56</sup> *Id.* § 3626(c)(2).

non-prison cases, by contrast, the parties can still settle for virtually anything they want that is not affirmatively illegal and is not outside the scope of the litigation as framed by the pleadings.<sup>57</sup>

At least in theory, this requirement undermines a large part of the basis of injunctive settlements: the parties' desire to avoid findings that they have acted illegally, and their desire to avoid the burdens and publicity of a trial. In practice, courts have been willing to approve consent judgments that stipulate conclusorily to the required PLRA findings,<sup>58</sup> sometimes with significant reservations,<sup>59</sup> and have not required evidentiary proceedings to support the entry of such agreed orders. To date, this practice appears to have remained unchallenged, and significant injunctive settlements have been reached in some cases subsequent to the PLRA's enactment.

Second, the prospective relief section of the PLRA also includes provisions targeting specific types of relief. Preliminary injunctions must not only be supported by the need/narrowness/intrusiveness findings; their life is also limited to ninety days unless the injunction is made final—i.e., the litigation completely concluded—within that time.<sup>60</sup> Since prison litigation of any significant scope is rarely concluded so quickly, the utility of preliminary injunctions is thereby

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<sup>57</sup> See *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986).

<sup>58</sup> See, e.g., *Sheppard v. Phoenix*, No. 91 Civ. 4148 (RPP), Stipulation of Settlement at 4 (S.D.N.Y. July 10, 1998) ("[T]he parties stipulate, based on the entire record, that the remedies set forth in this Stipulation and Proposed Order are narrowly drawn, extend no further than necessary to correct violations of the federal rights of the plaintiff class, and are the least intrusive means necessary to accomplish redress").

<sup>59</sup> See, e.g., *United States v. Clay County, Georgia*, No. 4:97-CV-151, Consent Decree (M.D. Ga. filed Aug. 20, 1997), *approved*, Order (M.D. Ga. Aug. 26, 1997) (stipulating to conclusory PLRA findings, stating that liability had not been litigated, and disclaiming any preclusive effect except between the parties); *Makinson v. Bonneville County*, No. CIV97-0190-E-BLW (D. Idaho Apr. 30, 1997) (stipulating that agreements are not findings of fact or conclusions of law with respect to the parties' claims or defenses); *Lozeau v. Lake County, Montana*, No. CV-95-82-M RFC, Decree at 15 (D. Mont. Oct. 23, 1996) (referring to "alleged" violation of federal rights). In some cases, the court has supplied the PLRA findings without a stipulation from the parties. See *Duffy v. Riveland*, No. C92-1596R, Stipulation and Order at 2-3 (W.D. Wash. Aug. 31, 1998) (including stipulation disclaiming admissions of liability or violation and conclusory recitation by court of the PLRA findings).

<sup>60</sup> 18 U.S.C. § 3626 (a)(2).

drastically reduced, probably accounting for the dearth of case law applying this provision.<sup>61</sup>

The ability of federal courts to remedy prison overcrowding is restricted by provisions concerning "prisoner release orders,"<sup>62</sup> defined as "any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison."<sup>63</sup> Such an order may be entered only if other less intrusive relief has been tried and has failed to remedy the violation of federal law.<sup>64</sup> A three-judge court must be convened,<sup>65</sup> and may enter a prisoner release order only if it finds by clear and convincing evidence that crowding is the "primary cause" of the federal law violation and no other relief will correct it.<sup>66</sup> There has been little judicial construction of this part of the PLRA, probably because there have been few attempts to obtain new overcrowding relief since its enactment.<sup>67</sup>

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<sup>61</sup> One recent decision holds that successive preliminary injunctions may be entered if the circumstances justifying the initial injunction remain unchanged. *See Mayweathers v. Terhune*, 136 F. Supp. 2d 1152, 1154 (E.D. Cal.), *aff'd*, 258 F.3d 930 (9th Cir. 2001).

<sup>62</sup> 18 U.S.C. § 3626(a)(3)(E).

<sup>63</sup> *Id.* § 3626(g)(4).

<sup>64</sup> *Id.* § 3626(a)(3)(A).

<sup>65</sup> *Id.* § 3626(a)(3)(B).

<sup>66</sup> *Id.* § 3626(a)(3)(E).

<sup>67</sup> Since enactment of the PLRA, such orders have been entered, if at all, by consent. *See Inmates of Occoquan v. Barry*, No. 86-2128 (D.D.C., Jan. 20, 1998) (approving order by three-judge court reciting both prisoner release order and prospective relief requirements of PLRA); *Duran v. Johnson*, No. 77-0721-JC, Amended Stipulation (D.N.M. Aug. 11, 1997) (approving dormitory bed limits and square footage requirements by single judge, with stipulation not to move under PLRA for specified time); *Lozeau v. Lake County, Montana*, No. CV 95-82-M RMH (D. Mont. Oct. 23, 1996) (approving square footage requirements by single judge, reciting prospective relief requirements of PLRA but not prisoner release order requirements).

In the widely publicized litigation about recently convicted state prisoners retained in grossly overcrowded Alabama county jails, the federal court that entered injunctive relief did not mention the PLRA prisoner release provisions. The reason may be that the order did not require release of prisoners, but only their transfer from jail to prison, and is therefore arguably not a prisoner release order. *See Maynor v. Morgan County*, 147 F. Supp. 2d 1185 (N.D. Ala. 2001).

Other judicial constructions of this part of the statute have been confined to the definition of "prisoner release order," *see Berwanger v. Cottley*, 178 F.3d 834, 836 (7th Cir. 1999) (noting that a maximum population provision is a prisoner release order); *Tyler v. Murphy*, 135 F.3d 594, 595-96 (8th Cir. 1998) (holding order limiting

Finally, the most consequential aspect of the PLRA's recasting of prospective relief law is its provision for the termination of relief.<sup>68</sup> Upon the filing of a motion by defendants, the court must terminate prospective relief unless it finds a "current and ongoing violation" of federal law and makes the same need/narrowness/intrusiveness findings required for the initial entry of relief. Such a motion may be filed two years after the entry of relief and every year thereafter until successful.<sup>69</sup> In cases where the need/narrowness/intrusiveness findings were not made when the judgment was entered, a motion to terminate may be filed immediately.<sup>70</sup> Such motions are directed to be decided "promptly,"<sup>71</sup> and the cost of delay—inevitable in complex litigation like most prison injunctive cases—is imposed entirely on the plaintiffs: the statute provides that the mere filing of a termination motion operates as a "stay" (better described as a suspension) of the relief starting thirty days after the motion is filed, which may be extended to ninety days for good cause.<sup>72</sup> This automatic stay provision has been upheld by the Supreme Court against attack based on the separation of powers doctrine.<sup>73</sup>

This section of the PLRA has had immediate and significant consequences for prisoners. In many jurisdictions, legal protections obtained through years of labor have been swept away.<sup>74</sup> It has also had significant consequences for the

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technical probation violator population in a jail is a prisoner release order); *Inmates of Suffolk County Jail v. Sheriff of Suffolk County*, 952 F. Supp. 869, 883 (D. Mass. 1997) (holding, *contra Tyler, supra*, that a population cap is not a prisoner release order in the absence of an order to release), *aff'd as modified and remanded on other grounds*, 129 F.3d 649 (1st Cir. 1997), and to the provision permitting state and local officials to intervene to oppose and seek termination of prisoner release orders. *Ruiz v. Estelle*, 161 F.3d 814 (5th Cir. 1998).

<sup>68</sup> 18 U.S.C. § 3626(b).

<sup>69</sup> Some post-PLRA settlements have waived this right at least for defined periods of time. *See, e.g., Prison Legal News v. Crawford*, No. CV-N-00-0373-HDM-RAM, Stipulation and Judgment at 6 (D. Nev. Sept. 27, 2000) (agreeing not to seek to terminate for five years); *Duffy v. Riveland*, No. C92-1596R, Stipulation and Order at 2-3 (W.D. Wash. Aug. 31, 1998) (agreeing not to challenge the settlement for four years).

<sup>70</sup> 18 U.S.C. § 3626(b).

<sup>71</sup> *Id.* § 3626(e)(1).

<sup>72</sup> *Id.* § 3626(e)(2)-(3).

<sup>73</sup> *Miller v. French*, 530 U.S. 327, 348 (2000).

<sup>74</sup> *See, e.g., Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649 (1st Cir.

shape of the remedial process in prisoners' civil rights litigation. Prior law, still applicable in non-prison cases, recognized that institutional change takes time and may face resistance. Accordingly, the Supreme Court has held that a decree should be ended only when the defendant shows that there has been full and satisfactory compliance with the order for a reasonable period of time, the defendant has exhibited a good-faith commitment to the decree and the legal principles that warranted judicial intervention, and the defendant is "unlikely [to] return to its former ways."<sup>75</sup> Now, it appears, that likelihood of future recurrence of the constitutional violation has been defined out of the inquiry in prisoner cases.<sup>76</sup>

Thus, there is a paradox at the heart of the judgment termination provision. If a constitutional violation has been successfully held in check by an injunction, there is no "current and ongoing violation," and the PLRA's response is to do away with the injunction that suppressed it. If the legal violation recurs after the injunction is gone, Congress's answer is to file another lawsuit—an endeavor it simultaneously made more

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1997); *Plyler v. Moore*, 100 F.3d 365 (4th Cir. 1996).

<sup>75</sup> *Board of Educ. of Okla. v. Dowell*, 498 U.S. 237, 247-50 (1991); *accord*, *Freeman v. Pitts*, 503 U.S. 467, 490-93 (1992).

<sup>76</sup> One court, while upholding the statute as a whole, has suggested in dicta that depriving courts of the power to act in the face of the prospect of reversion to unconstitutional practices presents a serious separation of powers problem. *Gilmore v. California*, 220 F.3d 987, 1009 n.27 (9th Cir. 2000).

In any case, the notion of excluding the likelihood of future recurrence from consideration is not as simple as it seems. Some relevant substantive legal standards are satisfied by proof of the prospect of future injury based only on a current risk. See *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding risk of future damage to health actionable under the Cruel and Unusual Punishment Clause). Moreover, institutional life and conditions do not take place instantaneously and sometimes can only be meaningfully assessed over a period of time. Analogously, under the Clean Water Act, the Supreme Court has observed that either "continuous or intermittent violation" can be "ongoing noncompliance," *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 64 (1987), and Justice Scalia added: "A good or lucky day is not a state of compliance. Nor is the dubious state in which a past problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated." *Id.* at 69 (concurring opinion). In this light, statements that the statutory phrase "current and ongoing" addresses conditions "at the time the district court conducts the § 3626(b)(3) inquiry," *Cason v. Seckinger*, 231 F.3d 777, 784 (11th Cir. 2000), or "as of the time termination is sought," *Benjamin v. Jacobson*, 172 F.3d 144, 166 (2d Cir. 1999), beg a significant part of the question.

difficult.<sup>77</sup> Meanwhile, since the PLRA's enactment, much of the already scarce resources for litigation advancing prisoners' rights has been consumed in defending past gains against motions to terminate.

In addition to its practical consequences for prisoners, the PLRA termination provision has significantly compromised the independence of the judiciary and the separation of powers doctrine. One of the most basic principles of the separation of powers doctrine is the immunity of the final judgment of an Article III court from legislative revision.<sup>78</sup> Yet the PLRA has commanded the termination of injunctions, many of which were entered years before the terms of the PLRA were conceived, much less enacted.

The courts have rationalized this result by holding, in effect, that injunctions are not final in the same way that a money judgment is final. Injunctions remain "subject to alteration due to changes in the underlying law"<sup>79</sup> This is a familiar and unobjectionable proposition in cases enforcing statutory rights since, otherwise, courts might find themselves enforcing rights that Congress has altered or abolished.<sup>80</sup> One

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<sup>77</sup> At the same time Congress passed this invitation to litigation do-overs, it enacted the administrative exhaustion requirement of 42 U.S.C. § 1997e(a), which my conversations with other practitioners as well as my own practice suggest is now the major practical obstacle to the commencement of new injunctive litigation on behalf of prisoners. Congress also passed restrictions on the attorneys' fees recoverable in prison litigation, 42 U.S.C. § 1997e(d), with the purpose and effect of making it more difficult for prisoners to obtain counsel, and, in addition, prohibited recipients of funds from the federal Legal Services Corporation from representing prisoners. Legal Services Corporation Act, 42 U.S.C. § 504(a)(15), 110 Stat. 1321-55 (2001).

<sup>78</sup> That principle was not formally announced by the Supreme Court until *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Justice Scalia indicated that its belated proclamation simply reflected its status as a constitutional no-brainer: "Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Id.* at 230.

<sup>79</sup> *Miller*, 530 U.S. at 344-45. While *Miller* addressed the constitutionality of the PLRA's automatic stay provision, 18 U.S.C. § 3626(e), its separation of powers rationale is essentially the same as that of the courts of appeals in upholding the judgment termination provisions of 18 U.S.C. § 3626(b). See, e.g., *Benjamin v. Jacobson*, 172 F.3d 144, 161-62 (2d Cir.1999) (en banc); *Dougan v. Singletary*, 129 F.3d 1424, 1426 (11th Cir. 1997); *Gavin v. Branstad*, 122 F.3d 1081, 1088 (8th Cir. 1997).

<sup>80</sup> See *System Fed'n v. Wright*, 364 U.S. 642 (1961), in which a consent decree forbade union and employer from discriminating against non-union workers. After Congress amended the Railway Labor Act to permit union shops, thus specifically allowing discrimination against non-union workers, the Supreme Court held that the

would think this principle inapplicable in constitutional cases, where the law being enforced is immune from legislative modification. However, courts applying the PLRA have identified the relevant change in law as Congress's action in "establishing new standards for the enforcement of prospective relief in § 3626(b)."<sup>81</sup> Thus, even if constitutionally based, an existing judgment can be changed by Congress if Congress changes the law of judgments.<sup>82</sup>

This tautological analysis places constitutional cases on a similar footing to statutory cases for purposes of congressional second-guessing. It essentially destroys, for injunctive cases, the principle of immunity of Article III judgments from legislative revision that the Court announced so vigorously in *Plaut v. Spendthrift Farm, Inc.*<sup>83</sup> only a year before the PLRA's enactment. This result has troubled only one of the appeals courts that has passed on the question. That court distinguished between the constitutionally troublesome act of terminating final judgments and the more benign alternative of merely depriving those judgments of prospective effects, holding that the PLRA merely accomplished the latter.<sup>84</sup> This distinction between the prospective effect of a judgment, the only purpose of which is to have prospective effect, and the judgment itself—a distinction the court itself termed "formalistic" though "seminal"<sup>85</sup>—is reminiscent of the old joke that defines legal reasoning as the art of thinking about something that is inextricably intertwined with something else but without thinking of the something else. Forget life imitating art; here, the law imitates satire.

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consent decree should be modified to bring it into conformity with the amended statute. *Id.* at 651.

<sup>81</sup> *Miller*, 530 U.S. at 346-47; *accord*, *Berwanger v. Cottey*, 178 F.3d 834, 839 (7th Cir. 1999) (stating that "new criteria for relief" are "a constitutionally sufficient ground for reopening the prospective component of a judgment"); *Benjamin*, 172 F.3d at 161.

<sup>82</sup> Characterizing this PLRA provision as a change in law permitted the Court to dismiss as inapposite the holding of *United States v. Klein*, 80 U.S. 128 (1871), that Congress may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

<sup>83</sup> 514 U.S. 211 (1995).

<sup>84</sup> *Gilmore v. State of California*, 220 F.3d 987 (9th Cir. 2000).

<sup>85</sup> *Id.* at 1003.

To appreciate the significance of this doctrinal development for enforcement of constitutional rights, it is necessary to consider it in conjunction with one of the Supreme Court's prior decisions concerning separation of powers, *Robertson v. Seattle Audubon Society*,<sup>86</sup> part of the highly publicized controversy over protection of the Northern spotted owl. While the case was pending, Congress passed the Northwest Timber Compromise statute,<sup>87</sup> which provided that compliance with certain provisions of that new law would be deemed to constitute compliance with other provisions of prior law. To make its intent crystal clear, Congress cited the pending litigation by caption and docket number.<sup>88</sup> The Supreme Court found nothing offensive to the separation of powers in this legislatively directed resolution of pending federal court proceedings, since it amended existing statutory law, albeit narrowly.<sup>89</sup> The Court was untroubled by the fact that the legislation was explicitly shaped to dictate the result in particular pending cases.

Putting these pieces together, *Robertson* stands for the proposition that where Congress has the substantive power to legislate, it can do so in a way that is targeted and tailored to particular pieces of litigation. The PLRA cases, including the Supreme Court's decision in *Miller v. French*,<sup>90</sup> appear to give Congress the equivalent power to legislate with respect to the remedial powers of the courts in constitutional cases and to

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<sup>86</sup> 503 U.S. 429 (1992).

<sup>87</sup> See Dep't of the Interior and Related Agencies Appropriations Act, §§ 1 *et seq.*, 318, 103 Stat. 701 (1990).

<sup>88</sup> In Congress's own words:

[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al., v. F Dale Robertson*, Civil No. 89-99 and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr.*, Civ. No. 87-1160-FR.

*Robertson*, 503 U.S. at 434-35 (quoting Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745, § 318(b)(6)(A)).

<sup>89</sup> *Id.* at 438-41. In so characterizing Congress's action, the Court dismissed the argument that the statute was unconstitutional under the rule of *Klein*, 80 U.S. at 146, which forbids Congress to "prescribe rules of decision" for the judiciary in particular cases. *Robertson*, 503 U.S. at 441.

<sup>90</sup> 530 U.S. 327 (2000).



apply new laws to prior judgments. The emerging syllogism would seem to be completed by the proposition that now, if a federal court does something that Congress does not like in the course of enforcing the Constitution, Congress can direct the termination or the modification of that specific judicial act. It cannot (yet) reverse a court's finding that the Constitution was violated. But arguably it could say, for example: the judgment will have a life of only one year; or the particular kind of remedy that appears in this judgment must terminate immediately and can only be reinstated after the court has tried six other remedies and made findings based on a new record that they did not work; or even that Congress disapproves the kind of remedy prescribed in paragraph forty-four of an injunction, and that paragraph will terminate upon enactment of the legislation. Thus, a recalcitrant litigant aggrieved by a federal court injunctive order now has *de facto* a continuing right of appeal to the legislative branch in addition to the usual single appeal to an appeals court. One need only try to envision the course of Southern school desegregation, had such a rule been in effect during the late 1950s and the 1960s, to appreciate the havoc that may be in store for the judicial enforcement process in future acrimonious civil rights controversies.

Can this possibly be the law? One would think and hope not. Certainly, such a formulation, which would make Congress a collateral appeals court and in some cases a co-manager of constitutional litigation, contravenes the idea of separation of powers in the most literal fashion. It crashes head-on into the more specific command that the decisions of an Article III court may not be reviewed and revised by other branches of government.<sup>91</sup> But the appeals courts and the Supreme Court seem, at least rhetorically, to have painted the law into a corner, leaving no identifiable doctrinal stopping place to the incursion of the legislature on the remedial powers

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<sup>91</sup> See, e.g., *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned, or refused faith and credit by another Department of Government."); *Gordon v. United States*, 117 U.S. Appx. 697, 700-04 (1864) (opinion of Taney, J.) (holding judgments of Article III courts "final and conclusive" and not subject to review by a non-Article III body); *Hayburn's Case*, 2 U.S. 409, 411 (1792).

of the federal courts in constitutional cases, other than the bare proposition that Congress cannot overturn a finding of constitutional violation. By dismantling important parts of the conceptual armory of the separation of powers, they have opened the door to a new and genuinely radical proposition of legislative supremacy over the work of the courts. And until and unless the courts devise new (or refurbish old) conceptual tools to defend their remedial authority replacing those they have kicked aside in upholding the PLRA, the constitutional rights, not just of prisoners, but of all litigants, will have lost much of the security historically afforded by our independent judiciary. Consistent with the familiar logic of Pastor Niemoller,<sup>92</sup> persons other than prisoners may soon have good reason to regret the enactment and the judicial embrace of this statute.

## CONCLUSION

The Prison Litigation Reform Act represents a fundamental shift in the long-running debate about court stripping. The vexed question whether Congress may exclude controversial constitutional issues from federal judicial review, never definitively answered, is effectively sidestepped by the PLRA, which instead imposes a series of restrictions and disincentives on congressionally disfavored litigants and disfavored claims. Individually and cumulatively, these provisions significantly impair the enforcement of constitutional rights and erode the principle of separation of powers, and they drastically compromise the ideal of equal justice under law, creating a class of second-class litigants and second-class constitutional claims. The judiciary has failed to date to respond effectively to these incursions on its

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<sup>92</sup> In Germany they came first for the communists, and I didn't speak up because I wasn't a communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time no one was left to speak up.

Martin Niemoller, quoted in JOHN BARTLETT, *FAMILIAR QUOTATIONS* 684 (Justin Kaplan ed., 16th ed. 1992).

independence, or even to suggest definable limits on congressional power to make such incursions. This failure suggests that the structure of constitutional enforcement through judicial review may now be at significant risk, not of wholesale abolition, but of impotence imposed piecemeal by restrictive measures directed at popular and legislative scapegoats *du jour*